

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 19**

**ABM ONSITE SERVICES – WEST, INC.**

**and**

**CASE NO. 19-RC-144377**

**INTERNATIONAL ASSOCIATION OF  
MACHINISTS AND AEROSPACE WORKERS,  
DISTRICT W24, AFL-CIO**

**EMPLOYER’S REQUEST FOR REVIEW OF DECISION AND DIRECTION OF  
ELECTION ISSUED BY REGIONAL DIRECTOR OF REGION 19 AND BRIEF IN  
SUPPORT OF REQUEST FOR REVIEW**

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On March 6, 2015, the Regional Director of Region 19 of the National Labor Relations Board (“NLRB”) issued a Decision and Direction of Election (“D.D.E.”) in the above-captioned matter. Pursuant to Section 102.67(b) of the Board’s Rules and Regulations, as amended, the Employer, ABM Onsite Services-West, Inc. (“ABM Onsite” or the “Employer”) hereby submits its Request for Review of the Decision and Direction of Election.

## **I. STATEMENT OF POSITION**

This matter arose out of a petition for representation filed by the International Association of Machinists and Aerospace Workers, District W24, AFL-CIO (the “Union”) on behalf of all regular full-time and part-time bag jammer technicians and dispatchers employed by ABM Onsite at the Portland International Airport (“PDX”), excluding leads, office and clerical employees, professional employees, managerial employees, guards and supervisors as defined in the National Labor Relations Act (“NLRA”). Tr. 12:13-18.<sup>1</sup>

Due to type of work performed by the ABM Onsite employees at PDX, and the high degree of control exerted by airline carriers over ABM Onsite’s operations and employees there, ABM Onsite challenged the NLRB’s jurisdiction over it, asserting that its employees and operations at PDX fall exclusively within the scope of the Railway Labor Act (“RLA”), not the NLRA. On January 22, 2015, Hearing Officer Helena A. Fiorianti conducted a hearing to take evidence on the jurisdictional issue. ABM Onsite presented testimony and evidence detailing the nature of carrier control exerted over ABM Onsite employees and facts demonstrating that ABM Onsite’s employees perform work traditionally performed by employees of an air carrier.

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<sup>1</sup> References to the hearing record shall be as follows: ABM Onsite’s exhibits shall be cited as “ER Exh. \_\_\_\_”; the Union’s exhibits shall be cited as “Union Exh. \_\_\_\_”; Board Exhibits shall be cited as “Bd. Exh. \_\_\_\_” and references to the transcript shall be cited as “Tr. [page number]:[line number].”

As recognized by the Regional Director (D.D.E. 22), a two-part test is applied to determine whether an employer who does not fly aircraft for the transportation of freight or passengers is nonetheless a carrier subject to the RLA:

(1) Is the nature of the work performed by the employees that which is traditionally performed by airline employees (the “function” test)?

(2) Do RLA carriers own or control, directly or indirectly, the employer and its employees (the “control” test)?

*See, e.g. Aircraft Services Int’l, Inc.*, 352 NLRB 137, 139 (2008); *Evergreen Aviation Ground Logistics Enterprises, Inc.*, 327 NLRB 869, 869 n.1 (1999); *ServiceMaster Aviation Services*, 325 NLRB 786, 787 (1998).

The control test focuses on the role that the carriers play in the company’s daily operations and its effect on the manner in which the employees perform their jobs. *E.g., Quality Aircraft Services*, 24 NMB 286, 291 (1997). The following factors are often considered in determining whether sufficient carrier control exists:

- (1) Carrier control over the manner in which the entity conducts its business;
- (2) Carrier access to the company’s operations and records;
- (3) The role carriers play in hiring, firing and disciplining the company’s employees;
- (4) The degree to which carriers supervise the entity’s employees;
- (5) The degree to which carriers otherwise affect conditions of employment;
- (6) Carrier control over employee training; and
- (7) Whether the employees are held out to the public as carrier employees.

*See Automobile Distribution of Buffalo Inc. and Complete Auto Network*, 37 NMB 372, 378 (2010); *Signature Flight Support of Nevada*, 30 NMB 392, 400 (2003). Importantly, it is not

necessary for each of these factors to be present for the control test to be met and thus for a company to be found subject to the RLA. Indeed, in most – if not all – of the cases in which sufficient control has been found, at least some of these factors have not been present.

In his Decision and Direction of Election, the Regional Director accurately concluded that the function test was satisfied because ABM Onsite’s “dispatchers and jammer technicians perform work of a nature traditionally performed by employees of air carriers.” D.D.E. 23. ABM Onsite does not seek review of that aspect of the Regional Director’s decision. The Regional Director, however, incorrectly determined that “the degree of control that PAC has over the Employer is contractually no greater than the type of control exercised in a typical subcontractor relationship and does not constitute meaningful control such as to render the Employer subject to the RLA.” D.D.E. 29. In so finding, the Regional Director ignored or misinterpreted critical facts which show an overwhelming degree of carrier control over ABM Onsite employees at PDX. As a result, ABM Onsite respectfully requests a review of the Regional Director’s Decision and Direction of Election, and that the Board determine that it lacks jurisdiction over ABM Onsite in this matter. Alternatively, ABM Onsite requests that the Board refer this matter to the National Mediation Board (“NMB”) for an advisory opinion from that agency regarding ABM Onsite’s status as a derivative carrier under the RLA.

## **II. STATEMENT OF RELEVANT FACTS**

Before examining the Regional Director’s decision, a review of ABM Onsite’s operations at PDX is in order.

PDX is one of a small number of airports in the United States to implement a comprehensive Baggage Handling System (“BHS”). At PDX, the BHS is a five-mile long conveyor system that utilizes state-of-the-art technology to direct and monitor passenger checked

baggage. D.D.E. 4. The system uses scanning systems and Transportation Security Administration (“TSA”) approved technology to streamline the baggage handling process and address security policies and procedures. Tr. 19:22-20:6; 22:5-10; 24:4-10; D.D.E. 4.

At PDX, ABM Onsite employees perform baggage handling services associated with the BHS for the airlines, through the Portland Airlines Consortium (“PAC”). Tr. 14:14-16; 15:20-23; D.D.E. 2. PAC is a non-profit corporation that is comprised of all the airlines that operate out of PDX. Tr. 29:22-30:4; 223:18-23; D.D.E. 2-3. PAC is designed to provide support services to the airlines at PDX and is governed by a committee comprised of representatives from each member airline. Tr. 29:22-30:4; 223:18-23. John Imlay is the General Manager for PAC. Tr. 15:24-16:1. Mr. Imlay’s role is “to represent PAC in all matters relating to [ABM Onsite’s] performance of the Services.” ER Exh. 1, Section 3.02; D.D.E 2-3. As General Manager, Mr. Imlay has the explicit contractual authority to “manage, monitor, and coordinate the performance” of ABM Onsite’s employees. *Id.* (emphasis added).

In 2010, PAC contracted out specific baggage handling services to a corporate predecessor of ABM Onsite, Linc Facility Services, LLC (“Linc”); that contract continues to govern the PAC-ABM Onsite relationship today. Tr. 32:7-13; 222:25-223:2; ER Exh. 1; D.D.E. 3. PAC’s contract with ABM Onsite covers, in general terms, the various services ABM Onsite provides to PAC at PDX. Tr. 34:3-6; D.D.E. 6. ABM Onsite’s arrangement with PAC at PDX is in the nature of a “cost plus” agreement, through which ABM Onsite is reimbursed for all of its costs incurred in performing the services under the contract (subject to PAC approval), plus an additional percentage on top of its costs, which represents ABM Onsite’s compensation or fee for its services. Tr. 82:23-24; 83:3-7; 226:1-4; D.D.E. 6. Among the reimbursable costs are all

of ABM Onsite's labor costs, which include, for each employee, the employee's compensation, unemployment insurance, health and welfare benefits, and taxes. Tr. 225:16-226:16; ER Exh. 4.

As of the date of the hearing, ABM Onsite employed 32 employees at PDX to provide the baggage handling services to the airlines. Tr. 15:6-8. That figure included 27 employees who would fall within the unit the Union seeks to represent (23 bag jammer technicians and 4 dispatchers), as well as 4 supervisors and a Facility Manager, Bonnie Wagoner. *Id.* As Facility Manager, Ms. Wagoner is responsible for overseeing the management and operations of the BHS system and the associated ABM Onsite employees. Tr. 14:14-16. She takes direction from PAC, through constant communication and interaction with Mr. Imlay concerning the operations and staffing of the BHS. Tr. 30:5-6. Ms. Wagoner is in continuous contact with Mr. Imlay throughout the work day – indeed, her office is directly next to Mr. Imlay's office – concerning a number of topics, including, among other things, the airlines' daily operational needs, changes to the airlines' schedules (and thus to the operations of the BHS and the schedules of ABM Onsite employees), communication from airlines regarding changes to their operations or issues that arose regarding ABM Onsite's handling of baggage, decisions relating to the hiring of ABM Onsite employees, and disciplinary decisions. Tr. 30:19-25. Mr. Imlay dictated and set Ms. Wagoner's work schedule so that she works the same hours as Mr. Imlay. Tr. 31:1-2.

The BHS typically operates 20 hours per day, 7 days per week, although the hours of operation fluctuate depending on the schedule and needs of the airlines. Tr. 38:8-12; D.D.E. 9. ABM Onsite employees are responsible for monitoring the system, clearing and resetting all baggage jams, security routing failures, minor faults, and other BHS operating faults. Tr. 18:8-11. There are several stations or posts along the system where ABM Onsite employees monitor and troubleshoot errors, jams, and outages, and from which they pick up and deliver luggage to

the airlines. Tr. 55:18-21; 57:4-10; ER Exh. 2; D.D.E. 4. ABM Onsite employees perform their work in or around the BHS, the airline make-up units (also known as bag wells), the baggage Control Room, the matrix and failsafe areas, the airline ticket counters, and the manual encode stations. Tr. 19:22-25; 23:9-12; 26:20-27:9; 46:4-16.

The Control Room serves as the organizational center for BHS. Tr. 36:16-23. The Control Room, which is staffed by ABM Onsite dispatchers, receives calls from the member airlines regarding baggage issues they may be experiencing. Tr. 35:14-21; 37:2-4; D.D.E. 4. For example, a member airline will call the Control Room and ask the ABM Onsite dispatcher about the status of a particular baggage item. *Id.*; Tr. 248:5-23; D.D.E. 4-5. At the airlines direction, ABM Onsite employees are then responsible for reviewing video footage and recorded data to identify the baggage item, retrieving the item, and delivering it to the airline, per the specific instructions provided by the airline. Tr. 36:16-23. The ABM Onsite dispatchers are the primary contact for all the airlines when it comes to baggage issues. Tr. 34:16-35:2, 35:14-21.

Bag jammer technicians are responsible for numerous functions associated with ensuring that passenger bags get from the airlines' ticket counters through the BHS and to the aircraft. The specific functions that a jammer technician is responsible for performing at a given time depends on which of the various posts the jammer technician is stationed during a particular time period. There are six such posts, and each jammer technician rotates through all of those posts during a single shift. Tr. 37:7-12; 55:18-21; 56:12-57:10; ER Exh. 2; D.D.E. 5. The PAC designated and established the posts that the jammer technicians staff. Tr. 37:7-12; ER Exh. 1, Exh. A.

One of the functions of jammer technicians is the clearing and resetting all baggage jams, which may occur due to oversized items or non-standard items being placed in the system, or



baggage being placed in the system incorrectly. Tr. 36:6-13; 37:7-12. Bag jammer technicians are also responsible for overseeing the run-out belt, which is where baggage ends up that, for whatever reason, cannot be scanned by the BHS system. Tr. 27:4-9; 59:2-11; D.D.E. 5. ABM employees are responsible for contacting the specific airline and delivering the item from the run-out belt to the airline according to its instructions. *Id.* For example, bag jammer technicians stationed at the South Oversize 2 position monitor the south side of the BHS and directly interact with Southwest, Alaska, and Spirit to get any misrouted bags to the proper airline bag well. Tr. 59:1-11; ER Exh. 2.

Bag jammer technicians are also responsible for monitoring the manual encode station. Tr. 46:1-16. The manual encode is a section of the system which provides an opportunity to rescan an item manually if the system has lost the item's tracking or the tracking information can no longer be read before the item is directed to the run-out belt. Tr. 46:4-16. Additionally, bag jammer technicians are responsible for collecting and distributing tubs to the member airlines. Tr. 63:21-24; D.D.E. 5. For example, bag jammer technicians stationed at the North Matrix/North Tub position will use PAC-provided carts to transport tubs from the airlines' makeup units to the designated tub station area and contact the bag jammer technician stationed at the airline ticket counters to come retrieve the tubs. Tr. 62:13-24.

Bag jammer technicians assigned to work the ticket counter work with the airlines to help place bags properly in tubs to prevent jams and to keep the airline system running to avoid delayed flights. Tr. 70:7-11. Bag jammer technicians stationed at the ticket counter will also look for oversize bags and any large groups checking bags and communicate with the airlines to prevent a backup or "gridlock" in the system. Tr. 70:12-18.

Bag jammer technicians are also responsible for retrieving baggage items from the oversize belt. D.D.E. 5. Oversize or odd-sized baggage is hand-screened by TSA agents and then is placed on a separate belt within the system. Tr. 27:12-19. Once the baggage reaches the end of the belt, a bag jammer technician is responsible for using a PAC-provided vehicle to retrieve the oversize item and directly deliver it to the appropriate makeup unit or directly to the aircraft, per airline instruction. Tr. 27:19-23; 28:1-23. For example, bag jammer technicians stationed at South Oversize 1 are responsible for checking the south oversize belt and the Check Bag Resolution Area (“CBRA”). Tr. 61:12-17; ER Exh. 2. The CBRA is the location where TSA physically inspects checked baggage pursuant to FAA regulations. Tr. 61:16-17. After retrieving baggage from the CBRA, ABM Onsite employees deliver the baggage directly to the appropriate airline. Tr. 61:19-20.

Bag jammer technicians are also responsible for monitoring “stray bags.” For example, a bag jammer technician stationed at South Matrix will be tasked with checking the area of the system where explosive detection systems (“EDS”) are located. Tr. 62:1-5. This is the heart of the system and contains many “power turns” where a bag can fall off or get stuck and not trigger a jam fault. Tr. 62:5-10. ABM Onsite employees are tasked with monitoring this area to correct any defaults or jams and ensure all bags are moving through the system. Tr. 62:9-10.

**III. THE REGIONAL DIRECTOR’S DECISION ON SUBSTANTIAL FACTUAL ISSUES IS NOT SUPPORTED BY THE RECORD AND IS CLEARLY ERRONEOUS.**

As is discussed further below, the airlines – through PAC – exercise an extraordinary amount of control over every aspect of ABM Onsite’s operations at PDX: what the employees do, how they do it, when they work, where they are posted, how much they get paid, what they

wear, etc.<sup>2</sup> The Regional Director summarily determined that “the degree of control that PAC has over the Employer is contractually no greater than the type of control exercised in a typical subcontractor relationship.” D.D.E. 29. However, as clearly demonstrated by the evidence put forth during the January 22, 2015 hearing and as set forth below, the relationship between ABM Onsite and PAC is not like the “typical” airline-contractor relationship. Rather, PAC exercises comprehensive control over ABM Onsite’s operations. Contrary to the Regional Director’s findings, PAC exerts substantial control over ABM Onsite, thus satisfying the two-part jurisdiction test under the RLA.<sup>3</sup>

**A. Carrier Control Over Staffing Levels And Scheduling.**

The Regional Director recognized that “[c]arrier control over aspects of business operations such as services to be performed, performance standard to be met, and staffing levels and scheduling, are considered in assessing the degree of carrier control over the manner in which an employer conducts business.” D.D.E. 24. Additionally, the Regional Director acknowledged that “the record reveals that the Employer must meet various carrier requirements including, providing services specifically described in the contract; meeting performance measures specified in the contract; following operational procedures developed by PAC; complying with airlines’ operations-related requests; meeting staffing levels approved by PAC; and scheduling employees to meet airlines schedules.” D.D.E. 24-25. Indeed, the Regional Director agreed that ABM Onsite employees’ “schedules fluctuate based on the needs of the

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<sup>2</sup> That the airlines have chosen to exercise their control over ABM Onsite by forming a consortium that is responsible for dealing with ABM Onsite on a daily basis does not affect the analysis of the control test. *See, e.g., Bradley Pac. Aviation*, 34 NMB 119 (2007) (service provider that managed fuel farm for consortium of airlines subject to RLA), *Aircraft Servs. Int’l Group*, 33 NMB 200 (2006) (same).

<sup>3</sup> As noted previously, the Regional Director correctly determined that ABM Onsite employees perform work traditionally performed by employees of air carriers, *see* D.D.E. 23, and ABM Onsite does not seek review of that aspect of the Decision and Direction of Election.

airlines.” D.D.E. 9. However, the Regional Director summarily concluded that such overwhelming control “is no greater than the influence exercised by airlines over employers in case where the NMB has declined jurisdiction.” D.D.E. 25. Such a conclusion ignores the record evidence in this matter, as well as numerous NMB decisions finding employers like ABM Onsite subject to the RLA.

As set forth during the hearing, the airlines exercise significant control over ABM Onsite’s staffing levels and the schedules that the ABM Onsite employees work. The number of ABM Onsite employees at PDX, the hours they work, the posts where they are required to work, and their shifts are all dictated by the airlines’ schedules and demands. Tr. 82:11-16; ER Exh. 1, Exh. A; D.D.E. 9. In reaching his decision, the Regional Director completely glossed over the significant control PAC exerts over ABM Onsite’s staffing, including PAC’s authority to set and determine what job classifications are even available to AMB Onsite employees. As noted in testimony during the hearing, the BHS initially began operations in 2010, with just the south side of the system operating at that time. Tr. 16:12-13. In 2011, the north side of system opened and thus the entire system was fully operational. Tr. 16:13-17. In approximately 2012, the airlines raised concerns about the number of bags cascading up to the ticket counter due to jams in the BHS not being addressed as promptly as the airlines wanted. Tr. 18:3-4. Due to the airlines’ concerns over the jams, ABM Onsite was instructed to restructure the job assignments of its employees so they could respond to jams in a more efficient manner and with an average response time of three minutes. Tr. 18:9-16. As a result of the airlines’ instructions and discussions with Mr. Imlay, the oversize technicians and bag jammer technicians were cross-trained so they could each perform the other’s job functions. Tr. 84:13-16; 86:16-25. Thus, employees were no longer separately categorized into oversize technicians and bag jammer

technicians; all technician responsibilities were distributed between the employees. Tr. 85:13-20. Mr. Imlay approved the training and staffing schedule proposed by Ms. Wagoner. Tr. 84:20-25; 85:21-23. During this time, PAC also eliminated one of the ABM Onsite supervisor positions. Tr. 87:1-8.

Additionally, PAC altered staffing levels again in approximately October 2014, when the former Facility Manager was terminated and Ms. Wagoner was promoted to interim Facility Manager, at Mr. Imlay's request. Tr. 88:4-7. Previously, there had been a Facility Manager, a supervisor who effectively acted as second-in-command at the station (Ms. Wagoner), and four leads. Mr. Imlay decided to eliminate Ms. Wagoner's former supervisor position and promote the leads to new supervisor positions. Tr. 89:11-13; 233:15-25. Throughout the lifetime of the contract, PAC has consistently exerted control over staffing decisions at PDX. In fact, ABM Onsite cannot increase staffing without PAC's prior approval. Tr. 84:4-7. The Regional Director failed to properly consider this evidence.

Moreover, the Regional Director completely ignored testimony concerning PAC's direct control over the number of employees ABM Onsite may hire through its annual budget process. Tr. 82:11-22; 224:8-17. For example, during the 2015 budget discussions, ABM Onsite requested additional funding to provide holiday staffing relief. Tr. 224:20-25. Mr. Imlay rejected this proposal and, as a result, ABM Onsite is not be able to staff additional employees during the holidays. Tr. 225:1-7.

In finding lack of control over the manner in which AMB Onsite conducts business, the Regional Director chiefly relied upon *Menzies Aviation, Inc.*, 42 NMB 1 (2014). However, in *Menzies*, the NMB did not comment on the carriers' actual ability and practice in determining job classifications and controlling staffing decisions and levels. Indeed, the NMB relied on

contractual provisions which provided Menzies with “explicit” control over personnel decisions. *Id.* at 5. In the instant case, PAC has the contractual and actual authority to remove an entire job classification, order cross-training of all employees, and create new job classifications, as can be seen in 2012 reorganization and the creation of additional supervisor positions in October 2014. Such immense control clearly demonstrates “meaningful control.” *See e.g., Sky Cap*, 13 NMB 292, 293 (1986) (the employees’ work “revolves around the right schedules of the airlines”); *Kannon*, 31 NMB at 417 (“Delta determines how many employees work each shift and at what locations”); *Signature Flight Support/Aircraft Service Int’l, Inc.*, 32 NMB 30, 39 (2004) (carrier’s schedule dictated the staffing levels and hours); *Aircraft Services Int’l Group, Inc.*, 31 NMB 361, 367 (2004) (same); *AvEx Flight Support*, 30 NMB 355, 362 (2003) (carriers provided company with overall number of staff hours for each position based on its flight schedules).

The fact that PAC wholly controls when, where, and with how many employees ABM Onsite will perform its services is strong evidence of carrier control under the jurisdictional analysis. The Regional Director’s decision completely overlooked evidence concerning PAC’s “meaningful control” over ABM Onsite staffing levels and failed to explain why such undisputed control is not important and worthy of consideration in the carrier control analysis.

**B. Carrier Control Over the Compensation of ABM Onsite Employees.**

In his ultimate analysis, the Regional Director failed to address the control exerted over the compensation of ABM Onsite employees. *See D.D.E. 23-29.* In the recitation of facts, the Regional Director seemingly acknowledged PAC’s control over compensation levels of ABM Onsite employees. For example, the Regional Director acknowledged that once the cross-training for former oversize technicians and bag jammer technicians was completed, as discussed above, ABM Onsite employees who were previously classified solely as oversize technicians

received a wage increase. *See* D.D.E. 11. However, the Regional Director erroneously stated that Ms. Wagoner “did not specifically recount any communications with PAC’s General Manager about the wage increase.” *Id.* In point of fact, Ms. Wagoner’s testimony clearly sets forth that Mr. Imlay approved increasing the rate of pay for the former oversize technicians to the bag jammer technician level after the cross-training was complete, which occurred at the same time that the number of ABM Onsite supervisors was reduced from two to one. Tr. 87:3-23; 89:23-25; 90:1.

Additionally, the Regional Director chose to overlook PAC’s authority to overrule and decline ABM Onsite’s salary proposals in his analysis. For example, when Ms. Wagoner was promoted to the position of Facility Manager, ABM Onsite initially intended to pay her the same annual salary as the departing Facility Manager. Tr. 232:21-233:7. Mr. Imlay ultimately rejected ABM Onsite’s proposal and set a different, lower salary rate for Ms. Wagoner. Tr. 233:8-9. While the Regional Director acknowledged such testimony in the factual recitation, *see* D.D.E. 11, such testimony is conspicuously absent from the Regional Director’s ultimate analysis. *See* D.D.E. 23-29.

It is undisputed that PAC makes the final compensation decision for all ABM Onsite employees. Tr. 88:1-3; 229:16-23. Indeed, ABM Onsite is not permitted to raise any employee’s rate of pay without Mr. Imlay’s prior approval. Tr. 236:5-8. ABM Onsite’s monthly invoice to PAC includes a detailed accounting of what each employee makes and the benefits each employee receives. Tr. 97:13-16; ER Exh. 4. Mr. Imlay reviews and approves these figures each month, and may require additional explanation from ABM Onsite before approving a particular invoice. Tr. 97:17-18. For example, Mr. Imlay has questioned the computation of the ABM Onsite employees’ health and welfare benefit expenses, resulting in invoice

adjustments. Tr. 106:21-107:19. Additionally, ABM Onsite is required to receive approval from PAC for any and all overtime, a factor often cited in cases in which RLA jurisdiction has been found. Tr. 90:2-8; 217:12-19; ER Exh. 1, Exh. E (payment for overtime will be made only upon prior written consent of PAC General Manager). *See, e.g., Argenbright Security*, 29 NMB 340, 345 (2002) (carrier had to approve overtime); *ServiceMaster Aviation Services*, 24 NMB 186, 183 (1997) (carrier had to approve overtime in advance); *International Total Services*, 24 NMB 18, 22 (1996) (same). Moreover, ABM Onsite employees on the PAC contract receive a different holiday pay rate than ABM Onsite employees on any other project or contract. Tr. 148:17-24. Such testimony was discounted by the Regional Director without explanation.

Also absent from the Regional Director's analysis, the record clearly reflects that PAC's control over ABM Onsite employees' compensation even extends to potentially paying those employees directly, and then deducting that pay from the amount PAC pays to ABM Onsite in a particular month. The contract states that if ABM Onsite underpays its employees, "PAC may withhold or cause to be withheld, out of payments due to the Contractor, an amount sufficient to pay the employees, the difference between the salaries required to be paid hereby and the salaries actually paid such employees for the total number of hours worked." ER Exh. 1, § 3.12.

This type of extensive carrier control over wages and rate of pay further demonstrates RLA jurisdiction. *See Boeing Airport Equipment, Inc.*, 7 NMB 396, 396-97 (1980) (finding RLA jurisdiction where employees' wages were subject to review and approval by United). Indeed, in many cases, control has been found despite a specific finding that the carriers did not set or control compensation. *See, e.g., New York Interstate Service, Inc.* 14 NMB 439, 441 (1987) (finding RLA jurisdiction even though employer "independently set[] the rates of pay and benefits its employees receive[d] [and] receive[d] monthly payments from [airline] which



fluctuate[d] with the number of hours worked that month by [contractor] employees.”); *John Menzies PLC d/b/a Ogden Ground Servs., Inc.*, 30 NMB 404, 408 (2003) (finding RLA jurisdiction even though employer determined the rates of pay and benefits for its employees). Thus, the Regional Director’s decision incorrectly concluded that the nature and extent of control exercised by PAC over how ABM Onsite conducts its business did not constitute meaningful control under NMB standards.

**C. Carriers’ Role In The Hiring, Termination, And Discipline of ABM Onsite Employees.**

The Regional Director acknowledged that “where the evidence establishes that the air carrier actually makes personnel decisions or effectively recommends them, the NMB has considered such evidence sufficient to establish carrier control.” D.D.E. 26. However, despite such recognition, the Regional Director erroneously resolved that “the Employer produced no documents showing PAC actually or ultimately deciding any personnel matters related to employees performing baggage handling services during the years the Employer has contracted with PAC.” D.D.E. 28 (emphasis added). Such a conclusion wholly ignored the substantial, and unrefuted, testimonial evidence of significant control that the carriers exercises over ABM Onsite’s PDX operations, specifically regarding PAC’s role in the hiring, promotion, termination, and assignment of ABM Onsite employees.

At the outset, in analyzing carriers’ control over ABM Onsite personnel decisions, the Regional Director once again took no notice of evidence concerning Ms. Wagoner’s promotion to Facility Manager. After the departure of the prior Facility Manager, ABM Onsite planned to post the position for open bidding and interviews. Tr. 232:9-11. Mr. Imlay instructed ABM Onsite not to post the opening for Facility Manager and further relayed that he wanted Ms. Wagoner to fill the position. Tr. 232:12-20. As the record clearly indicates, such oversight by

Mr. Imlay is not unusual. Indeed, Mr. Imlay approves all ABM Onsite promotions. Tr.182:13-25. For example, ABM Onsite selected Thomas James Shannon for a promotion from bag jammer technician to dispatcher. Tr. 255:5-24. Before the promotion, the former Facility Manager had to discuss it with Mr. Imlay. Tr. 257:21-22. Mr. Imlay, however, only approved Mr. Shannon to be elevated to dispatcher on a temporary or trial basis. Tr. 257:11-14. As a result, Mr. Shannon was only promoted to the dispatcher position on a temporary basis initially. Tr. 257:11-23. The Regional Director attempts to discount this testimony by arguing that ABM Onsite merely “opted to acquiesce to PAC’s General Manager’s suggestions and in other instances effectively rejected PAC’s suggestions.” D.D.E. 28. Such conclusory statements are unsupported by the record. Indeed, Mr. Shannon, a witness for the Union, testified that Mr. Imlay was consulted prior to his promotion and that Mr. Shannon would only be elevated to the dispatcher position on a “temporary basis.” Tr. 257:21-23.

Moreover, the Regional Director wholly discounted evidence concerning Mr. Imlay’s authority to dictate which employees perform certain positions and what shifts employees may work. For example, Mr. Imlay was concerned that a dispatcher working the morning shift did not display proper problem solving techniques and lacked confidence in making “swift decisions.” Tr. 118:10-12. Mr. Imlay instructed the Facility Manager at the time to move this employee to the night shift – which was less busy and hectic than the morning shift – until the person was “up to par.” Tr. 118:12-15. Once Mr. Imlay felt that the employee had improved, he was moved back to the morning shift. Tr. 118:16-18. Such evidence clearly demonstrates that PAC “actually or ultimately decid[ed] [] personnel matters related to employees performing baggage handling services during the years the Employer contracted with PAC.” D.D.E. 28.

The carriers, through PAC, also have the right to demand that ABM Onsite remove personnel from the BHS operations altogether – which necessarily would result in their dismissal from ABM Onsite. ER Exh. 1, Section 3.05 (“PAC reserves the right to direct the Contractor to remove any personnel from the performance of Services from any position upon material reason therefore given in writing.”). Additionally, ABM Onsite does not have the authority to replace “Key Personnel” without the prior written consent of PAC. ER Exh. 1, Section 3.05.

Mr. Imlay has the authority to overrule or bypass any step in ABM Onsite’s disciplinary process, and approves all terminations from the contract. Tr. 149:1-5; 178:24-179:2.<sup>4</sup>

The Regional Director erroneously determined that despite such clear contractual language, “the Employer produced no documents showing PAC actually or ultimately decid[ed] any personnel matters.” D.D.E. 28 (emphasis added). Such a finding ignores the record testimony in this matter establishing that fact, and places a wholly inappropriate burden on the employer by discounting unrefuted testimonial evidence about such matters simply because no paper trail was created. The record evidence clearly demonstrates that the carriers’ authority in this regard is not merely theoretical, and has been exercised at PDX. In 2011, Ms. Wagoner (a supervisor at the time) was informed that there had been a physical altercation between an ABM Onsite employee and an employee of another airline contractor earlier that day, near the United Airlines’ ticket counter. Tr. 166:18-25. When Ms. Wagoner reported for her shift, Mr. Imlay directed her to meet with United’s manager about the incident. Tr. 170:4-7, 12-14. At the instruction of United and Mr. Imlay, Ms. Wagoner collected witness statements regarding the incident and verbally presented the information to Mr. Williams, the Facility Manager at the

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<sup>4</sup> The level of control exerted by PAC over ABM Onsite’s employees with respect to discipline and termination factually distinguishes this matter from *Menzies Aviation, Inc.*, 42 NMB 1 (2014). In that case, the NMB specifically relied on the fact that Alaska could not require Menzies to breach or depart from the disciplinary processes set out in its employee handbook in finding that Menzies employees were not subject to the RLA. *Id.* at 4.

time. Tr. 167:11-15, 20-21; Tr. 174:1-2. Mr. Williams presented the information to Mr. Imlay and the United Airlines' manager. Tr. 174:6-8. Ultimately as it was "the client's request to have [the employee] removed, due to his fighting on duty", the ABM Onsite employee was terminated. Bd. Exh. 2; *see also* Tr. 117:5-12. The Regional Director attempts to discredit this account by concluding that "the record does not precisely establish whether the Employer held the contract at the time of this 2011 discharge." D.D.E. 16. Such distinction is ultimately irrelevant. The record is clear that the original agreement signed by Linc and PAC is still in effect today and continues to govern the relations between PAC and ABM Onsite. *See* Tr. 32:12-16. Further, the documentation provided by ABM Onsite plainly sets forth that the employee was removed due to the client's request. Such evidence clearly demonstrates PAC's ability to dictate and control personnel decisions under the contract. *See Boeing Airport Equipment, Inc.*, 7 NMB at 396-97 (finding RLA jurisdiction where carrier had right to require the termination of contractor employees).

The Regional Director also discounted testimony concerning Mr. Imlay's direct control over terminations in 2013, when there is no question that ABM Onsite was performing the services under the contract. In 2013, several ABM Onsite employees were involved in an incident on the BHS floor. Tr. 184:20-22. ABM Onsite conducted an investigation and recommended the termination of multiple individuals. Tr. 184:21-23. Mr. Imlay did not approve the terminations initially, and instead directed ABM Onsite to further investigate the situation. Tr. 185:1-3, 13-24. Indeed, Mr. Imlay specifically instructed ABM Onsite not to terminate the employees involved in the incident until more information about the incident was obtained. Tr. 186:3-10. Ultimately, after further investigation, the employees were terminated with Mr. Imlay's approval. Tr. 185:22-24.

PAC also exerts control over the discipline of ABM Onsite employees short of termination. Tr. 114:18-25. For example, in January 2015 Mr. Imlay raised concerns to Ms. Wagoner regarding an employee's attendance. Tr. 115-1:3. In response to Mr. Imlay's request, Ms. Wagoner gathered information concerning the employee's recent attendance for Mr. Imlay. ER Exh. 7. Mr. Imlay ultimately instructed Ms. Wagoner to keep him apprised of the situation and instructed Ms. Wagoner that if the employee did not improve, ABM Onsite would need "to take action." Tr. 115-4-7. The Regional Director failed to consider this evidence in his analysis.

The ability of a carrier to insist upon removal of personnel from its account – and the fact that the employer has disciplined employees based on carrier complaints – has long been held by the NMB to constitute strong evidence of carrier control. In *Bradley Pac. Aviation*, 34 NMB 119, 132 (2007), for example, the NMB found sufficient carrier control where one employee had been reassigned per a carrier's request and the employer had issued verbal and written warnings to its employees based on audit reports and complaints from the carriers. The NMB has reached the same conclusion in numerous other cases as well. *See, e.g., Air Serv*, 38 NMB 113, 121 (2011); *Swissport USA, Inc.*, 35 NMB 190, 196 (2008); *Air Serv*, 33 NMB 272, 286-87 (2006); *Aeroground, Inc.* 28 NMB 510, 517 (2001) (finding carrier control where employees had been "hired, counseled, suspended, transferred, removed, and terminated based on carrier requests."). PAC has exercised its right to direct removal and/or reassignment of ABM Onsite employees, and has demonstrated substantial involvement in ABM Onsite's hiring, promotion and discipline decisions. The Regional Director's assertion that carrier control is not demonstrated due to lack of "documentation" ignores clear NMB precedent and discounts substantial testimony presented during the January 22 hearing.

**D. Carrier Interaction With, And Direction Of, ABM Onsite Employees.**

Carriers' direction of the work performed by contractor's employees is another factor cited in prior decisions as supporting the finding of carrier control. *See, e.g., Signature Flight Support of Nevada*, 30 NMB 392, 397 (2003); *Aircraft Service Int'l Group, Inc.*, 31 NMB at 367-68. The Regional Director erroneously concluded that "the record reveal[ed] a limited degree of supervision by PAC that is insufficient to establish meaningful control by it over the Employer." D.D.E. 28-29. In so concluding, the Regional Director summarily disregarded significant testimony concerning PAC's oversight and interaction with ABM Onsite employees, including testimony from the Union's own witnesses. Indeed, PAC and carrier employees directly interact and direct ABM Onsite employees on a daily basis. Tr. 248:5-9; 252:18 (employee Michale McGuire testified he was "involved" with American Airlines "every day.").

Due to the nature of services ABM Onsite employees provide, dispatchers communicate with airline carriers every day concerning missing bags. Tr. 48:4-11. ABM Onsite employees also directly communicate and receive instructions from airline employees if a bag is sent through the system without a proper checked bag tag. Tr. 47:22-48:2. Airlines also direct ABM Onsite employees to switch flights from one bag well to another. Tr. 137:10-11. As a result, ABM Onsite employees will have to change the route of operations, including the order and timing for retrieving bags from the oversize and run-out belts. Tr. 137:14-19.

ABM Onsite employees will directly drive vehicles out to the aircraft to get the bag to the appropriate airline for an on-time departure at the request of the airline. Tr. 49:19-22. Each airline has its own "cut off time" which sets forth the time that a passenger's baggage must be sent through the BHS in order to make the flight's departure time. Tr. 50:10-16. ABM Onsite

employees are responsible for monitoring all airline departures to ensure that baggage is delivered to the flight for an on-time departure. *Id.*

Additionally, bag jammer technicians are responsible for collecting and distributing tubs to the member airlines. Tr. 63:21-24. Each airline directs ABM Onsite employees where to place tubs at each ticket counter. Tr. 63:25-64:7; 64:25-65:20; 69:11. For example, Delta acquired a new mat at its ticket counter and directed ABM Onsite employees not to roll tubs behind their counter. Tr. 64:3-7. In 2014, Alaska Airlines directed ABM Onsite employees to place tubs in a separate and different location, directly overruling ABM Onsite's placement preference. Tr. 66:3-5; 68:4-17. Ultimately, ABM Onsite employees are informed to follow instructions from the airlines regarding tub placement at each ticket counter. ER. Exh. 12.

The Regional Director seemed to take issue with the alleged lack of testimony concerning Mr. Imlay's interaction with ABM Onsite employees. *See* D.D.E. 19-20. However, the record is replete with examples of PAC's and individual carrier's direct interaction with ABM Onsite employees. Indeed, as set forth above, PAC set the station positions for all bag jammer technicians and approved the specific assignments for each station. Tr. 37:7-12; 54:21-23; 55:8-9; 56:4-7; ER Exh. 2. In December 2013, Southwest Airlines was concerned about the number of jams the system was experiencing which caused bags to cascade up to the ticket counter and resulted in a number of Southwest bags missing flights. Tr. 133:16-25. A Southwest supervisor came directly to the control room to instruct ABM Onsite employees to correct the issue. Tr. 134:5-17. Due to the airline's request, Ms. Wagoner was instructed to report to work the next morning at 4:00 a.m., even though that was not her scheduled arrival time, to help troubleshoot the problem. Tr. 135:16-22. Ultimately, per the airline's approval, ABM Onsite employees

moved a portion of Southwest's flights to a different ticket counter to utilize a different, less busy part of the BHS and avoid a "traffic jam" of bags. Tr. 136:1-9; ER Exh. 13.

More recently, in 2014, Alaska Airlines complained that a large number of bags were missing flights. Tr. 128:16-18. Alaska Airlines purchased scanners for ABM Onsite employees to use and directed ABM Onsite employees to scan each oversize bag when it was retrieved from the system. Tr. 129:2-9. This was not a task that ABM Onsite employees typically performed and, in point of fact, it did not perform this task for any other airline. Tr. 130:4-5. Once Alaska Airlines felt that there had been sufficient improvement, it directed ABM Onsite employees to stop scanning bags. Tr. 130:18.

Thus, contrary to the Regional Director's conclusions, the record clearly demonstrates a high degree of supervision by PAC and the member airlines sufficient to establish meaningful control over ABM Onsite employees.

**E. ABM Onsite Employees Are Held Out to the Public As Carrier Employees.**

Additional compelling evidence of carrier control is demonstrated by the uniforms ABM Onsite employees are required to wear. The Regional Director attempts to distinguish the evidence presented during the January 22 hearing by concluding that "it is also unclear how much interaction employees in the petitioned-for unit have with the public, as those employees largely perform their work in the secured area in the lower level of the Airport." D.D.E. 29. However, the Regional Director ignored key evidence in reaching such a conclusion. Indeed, as set forth above, one of the positions that the bag jammer technicians rotate through during the day is the airlines' ticket counter, where they assist airline personnel in ensuring that bags are placed properly in tubs to prevent jams and to keep the airline system running to avoid delayed flights. Tr. 70:7-11. Bag jammer technicians stationed at the ticket counter also look for



oversize bags and any large groups checking bags and communicate with the airlines to prevent a backup or “gridlock” in the system. Tr. 70:12-18. Thus, contrary to the Regional Director’s conclusion, the evidence clearly demonstrates that ABM Onsite employees directly interact with and are seen by the public and, as set forth below, are held out as carrier employees.

PAC dictates what ABM Onsite employees must wear on the job, and has decided that ABM Onsite employees must wear uniforms with the PAC insignia and logo (with the exception of “casual Friday,” discussed below, which itself had to be approved by PAC). Tr. 111:4-6; ER Exh 1, Exh. A. The standard PAC uniform is a polo shirt with the PAC logo over the left breast pocket. Tr. 111:17-112:8. Thus, ABM Onsite employees are held out to the public as PAC employees. *See Swissport*, 35 NMB at 196 (finding employer was subject to RLA jurisdiction where, pursuant to the contract, employees were required to wear carrier uniforms and hold themselves out to the public as carrier employees); *Argenbright*, 29 NMB at 338 (finding sufficient carrier control where employees were required to wear carrier nametags and thus were held out to the public as carrier employees). The Regional Director’s failure to consider all evidence concerning ABM Onsite’s interaction with the public demonstrates clear error and necessitates review by the Board.

**F. Carriers Exert Control Over How ABM Onsite Employees Perform Their Jobs.**

**1. Carriers oversee and manage ABM Onsite employee training and qualifications.**

The carriers, through PAC, have established training requirements and qualifications that ABM Onsite employees must meet to perform services at PDX. This, too, demonstrates carrier control for purposes of the jurisdictional test. The Regional Director, however, rashly concluded that the “limited degree of carrier involvement in training of the Employer’s employees is

insufficient to establish meaningful control over the Employer.” D.D.E. 29. Specifically, the Regional Director argued that while “there is evidence that the Employer seeks PAC’s General Manager’s approval of at least some of its training materials, there is no evidence that the Employer is contractually required to do so.” D.D.E. 29. Such an argument directly contradicts the Regional Director’s earlier arguments. Indeed, in analyzing PAC’s access to ABM Onsite’s records, the Regional Director recognized that, contractually, PAC had access to ABM Onsite’s records; however, the Regional Director disregarded the contractual support, arguing that “the frequency with which [PAC] accesses such records appears to be more limited.” D.D.E. 25-26. With respect to training, the Regional Director seems to alter the importance of direct testimonial evidence supporting PAC’s involvement with training, relying instead of the lack of alleged contractual support. Such an argument is clearly erroneous and in direct contradiction to prior NMB precedent.

All ABM Onsite employees at PDX receive training based on the BHS Operations Manual, which was drafted by Mr. Imlay and PAC. Tr. 76:9-12. Mr. Imlay also has trained ABM Onsite employees on bag hygiene himself. Tr. 78:19-22. Furthermore, any additional training material is given to Mr. Imlay for his review and approval before it is distributed to ABM Onsite employees. Tr. 78:24-79:2. The ability to control training requirements has been cited in numerous cases as a factor in finding carrier control. *See, e.g., Automobile Distribution of Buffalo*, 37 NMB at 379; *Argenbright*, 29 NMB at 347; *ServiceMaster Aviation Services*, 24 NMB at 186. Thus, as the Regional Director erroneously disregarded testimony in support of PAC’s control over training requirements, ABM Onsite respectfully requests that the Board review the Regional Director’s Decision and Direction of Election.

**2. Carriers set and control performance standards and reward ABM Onsite employees for their performance.**

The Regional Director also failed to properly evaluate and consider all evidence concerning PAC's control over performance standards. The evidence clearly illustrates that PAC controls how ABM Onsite employees perform their services through the establishment and enforcement of performance standards that PAC requires ABM Onsite to meet. PAC requires ABM Onsite to perform all services "according to those rules and regulations for services at the Airport, as applicable, and as promulgated by the Port of Portland, PAC, its General Manager, TSA, [and] FAA." ER Exh. 1, § 3.03. Moreover, ABM Onsite is required to keep employee records of qualification and training onsite for PAC's inspection. ER Exh 1; Exh. A. Indeed, all ABM Onsite records pertaining to reimbursable costs are subject to audit by PAC. ER Exh. 1, Exh. E-1.

PAC also monitors ABM Onsite employees' productivity and performance. For example, ABM Onsite compiles statistics throughout each day, by employee, regarding the number of jams and fail-safes the system encounters, the number of bags that went to the run-out belt, the number of bags that went to the encode station, how many bags missed a flight for an airline, and if anything in the system was lost. Tr. 44:20-45:19; ER Exh. 1, Exh. A ("Contractor shall provide PAC with baggage statistics by airline as requested."); ER Exh. 8; ER Exh. 9. ABM Onsite submits these reports to Mr. Imlay for his review. *Id.* Per the contract, ABM Onsite employees are to ensure a 3-minute response time to any jams with an overall goal of 99% system availability. Tr. 18:9-11; ER Exh. 1, Exh. A. Such evidence is absent from the Regional Director's analysis.

PAC dictates and controls what rewards or bonus incentives ABM Onsite employees receive. For example, Mr. Imlay must approve and authorize lunch to be brought in for

employees as a reward for good performance. Tr. 108-17:24. Mr. Imlay also approved and set the bonus amount for the employee of the month program. Tr. 109:3-11. In December 2014, Ms. Wagoner approached Mr. Imlay about giving employees a holiday bonus in recognition of their hard work during the busy holiday season. Tr. 97:23-98:7. Ms. Wagoner not only needed Mr. Imlay's approval to provide employees with a holiday gift card, but also needed Mr. Imlay to approve the actual dollar amount for each gift card. Tr. 98:1-7. In point of fact, Mr. Imlay rejected Ms. Wagoner's initial proposed monetary amount and the two engaged in a back and forth dialogue before Mr. Imlay ultimately approved the request. Tr. 98:8-99:11; ER Exhs. 5, 6.

The Regional Director referenced the above testimony and evidence; however, ultimately downplayed the significance of such evidence. *See* D.D.E. 24-25. Indeed, the Regional Director simply concluded "[a]lthough the PAC contract and PAC's General Manager influence to a degree, the way the Employer conducts its operations, that degree of influence is no greater than the influence exercised by airlines over employers in cases where the NMB has declined jurisdiction." D.D.E. 25. Such a conclusion simply ignores the vast evidence that was presented at the January 22 hearing that carriers, in actuality, set and control performance standards and reward ABM Onsite employees for their performance and is contrary to prior NMB holdings. Indeed, the establishment and enforcement of performance standards of this sort have been cited in other cases as indicia of carrier control as well, *see, e.g., Quality Aircraft Services*, 24 NMB at 288 (carrier employees discussed performance of contractor's employees with contractor's supervisors on a daily basis); *ServiceMaster*, 24 NMB at 184 (carrier required contractor to meet specific performance standards), and, thus, the Regional Director's error in this regard mandates a review by the Board.

**3. Carriers provide all equipment and physical space used by ABM Onsite.**

The Regional Director also failed to appropriately consider evidence regarding carrier control over equipment and physical space used by ABM Onsite. In point of fact, PAC controls how ABM Onsite employees perform their services by providing the equipment that they use in performing their duties and by providing ABM Onsite with physical space at the airport. ABM Onsite employees use personal protective equipment (“PPE”), hard hats, gloves, locks, Taylor-Dunn carts, bikes, stand-up carts, and tubs in the performance of their duties. Tr. 41:10-42:11; 109:20-110:10. Indeed, PAC owns the vehicles ABM Onsite employees use to transport baggage items and, in point of fact, had the vehicles customized for ABM Onsite’s use. Tr. 28:1-3, 16-23; D.D.E. 6. PAC owns all of this equipment and provides it to ABM Onsite employees. Tr. 110:12-13, 22-23. PAC also provides ABM Onsite office space at PDX and pays for ABM Onsite’s utilities. Tr. 109:16-19. In fact, Ms. Wagoner’s office is a mere “five steps” away from Mr. Imlay’s office. Tr. 30:12-16. PAC also pays for ABM Onsite employees’ parking, ABM Onsite’s internet access, and the fees associated with the security badging process for each ABM Onsite employee at PDX. Tr. 92:7-8; 92:15-17; 107:22-108:6.

Further, under the cost-plus contract, all expenses are billed back to PAC. ER Exh. 4; Tr. 90:18-91:1. ABM Onsite submits monthly bills to Mr. Imlay for his review. Tr. 90:9-16. During Mr. Imlay’s review of the monthly invoice, he will question or push back on specific line items. Tr. 97:19-20; 106:13-18. For example, Mr. Imlay has requested corrections to the health and welfare line item billed to PAC. Tr. 106:21-25.

Although the Regional Director recognized the various equipment and physical space provided by PAC to ABM Onsite in his factual recitation, *see* D.D.E. 6-7, the Regional Director ultimately failed to address such factors in his analysis. *See* D.D.E. 22-30. The fact that carriers

provide equipment and/or physical space to a service provider has been cited in numerous cases as indicia of carrier control for purposes of the jurisdictional analysis. *See, e.g., Air Serv*, 35 NMB 201, 211 (2008) (carrier provided Air Serv with office space, telephone, electricity and cleaning services); *AvEx Flight Support*, 30 NMB at 362 (carrier provided free office space of supervisors). The Regional Director's failure to adequately consider this factor warrants review by the Board.

#### **4. Carriers exert control over uniform and grooming standards.**

As noted above, ABM Onsite employees are required to wear uniforms with the PAC insignia and logo and are held out to the public as PAC employees. *See supra* Section IV.E. While recognizing the uniform requirement, the Regional Director wholly ignored evidence concerning PAC's control over uniform and grooming standards. For example, ABM Onsite employees requested to have a "causal Friday." Tr. 112:16-17. Mr. Imlay took the request to the PAC committee and PAC approved employees wearing jeans on Friday and an ABM Onsite t-shirt. Tr. 112:18-23. After this change in policy, ABM Onsite employees requested to have a "causal Monday" for those employees that did not work on Friday, but Mr. Imlay rejected that request. Tr. 113:7-13. ABM Onsite also had to seek approval of Mr. Imlay for employees to wear sweat shirts or jackets. Tr. 113:23-114:12. Again, the Regional Director failed to consider this evidence in analyzing carriers' exertion of control over how ABM Onsite employees perform their jobs. *See D.D.E.* 26-29.

The right of carriers to dictate uniform and grooming standards has been cited in several cases as indicative of carrier control, even when the employees do not wear carrier uniforms or insignia. *See, e.g., Automobile Distribution of Buffalo*, 37 NMB at 379 (carrier approved uniform requirements and required that uniforms be clean and free from exposed objects); *North*

*American Aviation Services, PHL, Inc.*, 28 NMB 155, 159 (2000) (employees had to be in uniforms that were acceptable to the carrier and has to meet the carrier's grooming standards); *Command Security Corp.*, 27 NMB 581, 585 (2000) (contracts gave carriers right to approve uniforms and set general standards of appearance). Thus, the Regional Director's failure to consider this evidence in his analysis warrants review by the Board.

**IV. AT A MINIMUM, THE BOARD SHOULD SEEK AN ADVISORY OPINION FROM THE NMB**

The evidence discussed above compels the conclusion that the Regional Director erred in concluding ABM Onsite's operations and employees at PDX were not subject to the RLA. The Board should so hold, and thus dismiss this case for lack of jurisdiction.

If the Board is not inclined to do that, however, it should, at a minimum, seek an advisory opinion from the NMB on the jurisdictional question. It has been the Board's longstanding practice to do just that, particularly in cases where there is some question regarding the jurisdictional issue. As the Board held previously, "[a]lthough occasional departures may be justified, we believe the better policy, particularly where there are very difficult questions of interpretation under the RLA, is to refer jurisdictional questions of this type to the National Mediation Board." *Federal Express Corp.*, 317 NLRB 1155, 1155 (1995) (citing *Pan American World Airways*, 115 NLRB 493, 495 (1956)).

Certainly, the evidence and arguments presented by ABM Onsite show that there are at least serious questions regarding the jurisdictional issue here. The Board has never exercised jurisdiction over this aspect of ABM Onsite's operations, or over employees who perform this type of work. Indeed, given how few airports have a BHS similar to that which operates at PDX, it is not surprising that there is a paucity of precedent from either the Board or the NMB regarding whether the level of carrier control exercised over such employees satisfies the second

prong of the jurisdictional analysis. The jurisdictional issue in this case is not similar to those cited and discussed by the Regional Director, and would benefit from the expertise of the NMB.<sup>5</sup>

## **V. CONCLUSION**

The facts set forth in this matter support RLA jurisdiction. The Regional Director's Decision would eviscerate the second prong of the two-prong jurisdictional test, rendering the entire test meaningless. Based on the foregoing, ABM Onsite respectfully requests that the Board grant ABM Onsite's Request for Review; postpone the election currently scheduled for April 2, 2015 until the Board issues its decision on the appropriate jurisdiction; and dismiss the petition for lack of jurisdiction or, in the alternative, seek an advisory opinion from the National Mediation Board ("NMB") on the jurisdictional issue.

Submitted this 20th day of March, 2015.

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<sup>5</sup> Indeed, *Spartan Aviation Industries*, 337 NLRB 708 (2002), cited by the Regional Director (D.D.E. 30), makes the point that in cases of "arguable" RLA jurisdiction, the Board generally refers the matter to the NMB for an advisory opinion. Such referral was not necessary in that case because of the clear NMB precedent that performing flight training to allow a pilot to obtain his or her initial commercial license was not work traditionally performed by airlines, and thus the "function" prong was not met.



**CERTIFICATE OF SERVICE**

I hereby certify that, on this 20th day of March, 2015, a copy of the foregoing  
**EMPLOYER'S REQUEST FOR REVIEW OF DECISION AND DIRECTION OF  
ELECTION ISSUED BY REGIONAL DIRECTOR OF REGION 19 AND BRIEF IN  
SUPPORT OF REQUEST FOR REVIEW** was sent via electronic mail to:

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